

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW S. ENGLISH,

Plaintiff-Appellant,

v

KENNETH M. LORD and LORD & GUILLIAT,

Defendants-Appellees.

UNPUBLISHED

April 28, 2005

No. 253072

St. Clair Circuit Court

LC No. 03-001261-NM

Before: Wilder, P.J. and Fitzgerald and Kelly, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff appeals as of right the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(7) based on a determination that plaintiff's claims are barred by collateral estoppel. We affirm.

I. Basic Facts and Procedural History

In the underlying criminal case, plaintiff was charged with two counts of vehicular manslaughter and one count of felonious driving arising from a fatal two-car automobile accident. Plaintiff's parents retained defendants, Kenneth M. Lord and his law firm, Lord & Guilliat, to defend plaintiff against the criminal charges. Because plaintiff claimed to have no memory of the accident as a result of his injuries, he pleaded no contest to all three charges. At the plea hearing, plaintiff confirmed that his plea was voluntary and acknowledged that (1) he understood the charges against him and the potential punishment, (2) he discussed the plea with his attorney, (3) he was satisfied with his attorney's advice and representation, and (4) he was not promised any particular sentence in exchange for his plea.

Lord requested that the trial court consider sentencing plaintiff under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.* The prosecution objected to any HYTA status because of the "seriousness of the consequences of [plaintiff's] actions." Plaintiff was sentenced to three years' probation under HYTA, with the first thirty days to be spent in the county jail, the next 120 days to be spent at Huron House, followed by "boot camp" training if plaintiff was physically able, and other conditions including community service.

Two weeks after sentencing, the prosecutor filed a motion to correct the sentence, arguing that because a guilty plea is a precondition to sentencing under HYTA, the trial court did

not have jurisdiction to sentence plaintiff as it did when plaintiff pleaded no contest. Over Lord's objections, the trial court granted the prosecution's motion and ordered that plaintiff be resentenced. Lord also filed unsuccessful motions requesting that the trial court reinstate plaintiff's HYTA status and asking the court to order specific performance of the plea agreement. The trial court resentenced plaintiff to five years' probation, with the first year being served under house arrest at Huron House, followed by "boot camp."

Plaintiff was unsuccessful in complying with the terms of his probation and was charged with probation violation. Plaintiff, represented by different counsel, pleaded guilty to the probation violations. The trial court discharged plaintiff from probation and sentenced him to prison for a term of seventy-two to 180 months, with credit for 169 days served.

Plaintiff then hired Kenneth Mogill, Esq., to assist him in filing post-judgment motions. Plaintiff filed a motion for relief from judgment, specifically alleging that Lord's representation denied him the effective assistance of counsel. In particular, plaintiff argued that Lord's representation was inadequate for two reasons: (1) he failed to hire an accident reconstructionist to demonstrate that plaintiff did not cause the fatal accident and (2) he erroneously advised plaintiff he could be considered for HYTA status by pleading no contest. The trial court denied plaintiff's motion for relief from judgment in a written opinion.

Plaintiff filed an application for leave to appeal with this Court, which was "denied for lack of merit in the grounds presented." *People v English*, unpublished order of the Court of Appeals, entered October 10, 2002 (Docket No. 243738). Thereafter, our Supreme Court also denied leave to appeal because plaintiff "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)."¹

After exhausting his post-judgment remedies, plaintiff filed this legal malpractice claim against defendants on the same general grounds as set forth in his motion for relief from judgment, e.g. that Lord was negligent in not obtaining an accident reconstructionist and in advising plaintiff that he would be considered for HYTA status by pleading no contest. Defendants moved for summary disposition asserting that plaintiff's malpractice claims were barred by collateral estoppel in that all the claims were previously raised in plaintiff's criminal case and were determined to be without merit. Defendants further argued that plaintiff's claims fail as a matter of law because plaintiff would be unable to prove that but for Lord's conduct, plaintiff would not have been injured because plaintiff's injury (incarceration) was caused by his own failure to comply with the terms of his probation. Plaintiff opposed defendants' motion, asserting that: (1) that collateral estoppel does not bar this case because there was no substantive decision made by any court as to whether plaintiff's counsel was ineffective and (2) there is more

¹ Plaintiff also filed a petition for habeas corpus in federal district court, again alleging ineffective assistance of counsel. The federal district court determined that plaintiff was not entitled to relief because he failed to raise ineffective assistance of trial counsel before the state courts on direct appeal of his convictions, and accordingly, the federal court was not required to hear plaintiff's claims.

than one proximate cause of plaintiff's incarceration. After oral argument, the trial court granted defendants' motion for summary disposition.

II. Standard of Review

This Court reviews both a trial court's decision to grant a motion for summary disposition and issues concerning the application of collateral estoppel de novo. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). When reviewing a decision to grant summary disposition pursuant to MCR 2.116(C)(7), this Court considers the affidavits, pleadings, and other documentary evidence in the light most favorable to the nonmoving party. *Id.* at 480.

III. Collateral Estoppel

The purpose of collateral estoppel is ““to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication”” *Monat v State Farm Ins Co*, 469 Mich 679, 692; 677 NW2d 843 (2004), quoting *Detroit v Qualls*, 434 Mich 340, 357 n 30; 454 NW2d 374 (1990), quoting *Allen v McCurry*, 449 US 90; 101 S Ct 411; 66 L Ed 2d 308 (1980). It precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). As a general rule, for collateral estoppel to apply three elements must be met: (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment; (2) the same parties had a full and fair opportunity to litigate the issue; and (3) mutuality of estoppel. *Monat, supra* at 682-684. There are exceptions to the mutuality requirement, including the defensive use of collateral estoppel in a legal malpractice case. *Knoblauch v Kenyon*, 163 Mich App 712, 725; 415 NW2d 286 (1987).

To be necessarily determined in the first action, the issue must have been essential to the resulting judgment. *Qualls, supra* at 357. In other words, a finding upon which the judgment did not depend cannot support collateral estoppel. *Eaton Co Rd Commr's v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). To determine whether the parties in the first action had a full and fair opportunity to litigate an issue, a court should consider the factors set forth in 1 Restatement of Judgments, 2d, ch 3, Former Adjudication, § § 28-29. *Monat, supra* at 683-684 n 2. A criminal defendant who is unsuccessful in asserting a claim of ineffective assistance of counsel during the criminal proceedings is barred by the doctrine of collateral estoppel from later suing his defense attorney for legal malpractice. *Barrow, supra* at 478; *Schlumm v Terence J O'Hagan, PC*, 173 Mich 345; 433 NW2d 839 (1988); *Knoblauch, supra* at 712.

IV. Analysis

Plaintiff first argues that the issue of ineffective assistance was not actually or substantively determined by the criminal trial court because the criminal trial court rendered its decision without conducting a hearing or receiving a response from the prosecution in violation of MCR 6.508. In support of his position, defendant asserts in his brief on appeal that “MCR 6.508 specifically requires the trial court to determine whether an evidentiary hearing is required only *after* reviewing the motion and response.” We disagree.

Upon receipt of a motion for relief from judgment, a trial court must “promptly examine the motion together with all the files, records, transcripts and correspondence relating to the judgment under attack” MCR 6.504(B)(1). After reviewing the records, “if it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings.” MCR 6.504(B)(2). However, “[i]f the entire motion is not dismissed under subrule (B)(2), the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508.” MCR 6.504(B)(4).

Here, the criminal trial court denied plaintiff’s motion for relief from judgment under MCR 6.504(B)(2). The criminal trial court reviewed the motion and supporting materials, as well as the file, records, transcripts, and correspondence relating to the conviction. It then determined that plaintiff failed in his burden to establish “good cause” and “actual prejudice” from the alleged irregularities in support of his claim for relief. MCR 6.508(D). Our review of the record reveals that the criminal court was intimately familiar with the facts and circumstances of the criminal case and properly applied the law to the matter before it. Plaintiff is simply incorrect in his claim that the criminal trial court was required to receive a response from the prosecution before determining that an evidentiary hearing was not required and rendering its opinion.

Defendant next argues that the issue of ineffective assistance was not actually determined by the criminal trial. We disagree. The written opinion by the criminal trial court gave substantive consideration to both ways plaintiff claimed to have been denied the effective assistance of counsel and found both claims to be without merit. First, it determined that defendant Lord had great latitude in the decision to hire an accident reconstructionist as a matter of strategy and further because, even if there was error by counsel, it was not outcome determinative. Second, it found plaintiff’s plea was voluntary and he was guaranteed no particular sentence. We discern no error.

Plaintiff also argues that even if the issue of ineffective assistance was actually determined by the criminal trial court, relitigation is not precluded because plaintiff did not have a full and fair opportunity to litigate the issue. Plaintiff specifically asserts that this case falls within the exceptions set forth in 1 Restatement Judgments, 2d, ch 3, Former Adjudication, § 28(3), (5)(b), and (5)(c). We again disagree.

According to 1 Restatement Judgments, 2d, ch 3, Former Adjudication, § 28(3), (5)(b) and (5)(c):

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

* * *

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

* * *

(5) There is a clear and convincing need for a new determination of the issue . . . (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Plaintiff contends that section 28(3) applies to his case because there is a difference in the quality or extensiveness of the procedures in the criminal and civil cases because the criminal trial court never held an evidentiary hearing on the issue of ineffective assistance of counsel, nor did it receive a response from the prosecution before determining that no evidentiary hearing was required and rendering its decision. Because we previously concluded that neither an evidentiary hearing nor a response from the prosecutor in the criminal proceedings were required, we conclude that this case does not fall within section 28(3).

Plaintiff also contends that section 28(5)(b) applies to this case because it was not foreseeable to plaintiff in the criminal proceedings, when he was focused on vindicating his liberty interests, that Lord's incompetence would arise in a subsequent action. We disagree. On this record, we conclude that plaintiff could have foreseen a legal malpractice suit at the time that he was litigating the claim of ineffective assistance of counsel, especially because the claims asserted in the instant case and in the criminal action are almost identical. Further, plaintiff can be charged with knowledge of a possible malpractice claim when a motion seeking relief based on ineffective assistance of counsel is filed. *Gebhardt v O'Rourke*, 444 Mich 535, 544-545; 510 NW2d 900 (1994).

We also reject plaintiff's claim that section 28(5)(c) is applicable. Plaintiff again points to the lack of an evidentiary hearing and lack of a response from the prosecution to the motion for relief from judgment prior to the criminal trial court's determination. However, our Supreme Court has held that section 28(5)(c) should only apply "where there exists a compelling showing of unfairness, and it should not be applied simply on the basis that the first determination was patently erroneous." *Hackley v Hackley*, 426 Mich 582, 592; 395 NW2d 906 (1986). Because the criminal trial court followed MCR 6.504 in denying plaintiff's motion for relief from judgment, we conclude that this exception is also inapplicable to this case.

Finally, plaintiff argues that defendants' use of collateral estoppel in this case deprives him of his constitutional right to a jury trial. Plaintiff failed to cite any authority supporting his position. Therefore, we find that the argument is abandoned. MCR 7212(C)(7); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Regardless, there was no violation of plaintiff's right to a jury trial because that right applies only to factual issues, not issues of law. *Phillips v Mirac, Inc*, 470 Mich 415, 426-427; 685 NW2d 174 (2004). Here, the trial court properly determined as a matter of law that plaintiff's claim was barred by the doctrine of collateral estoppel.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly